

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

TETRA TECH CONSTRUCTIONS SERVICES, INC.,¹

Employer,

and

Cases 27-RC-8316
27-RC-8318

OPERATING ENGINEERS LOCAL 9 AND
LABORERS LOCAL 720,

Joint Petitioner.

ORDER OF CONSOLIDATION AND DECISION AND DIRECTION OF ELECTIONS

On March 22, 2004,² Operating Engineers Local 9 and Laborers Local 720 filed a joint petition under Section 9(c) of the National Labor Relations Act in Case 27-RC-8316 seeking to represent certain employees employed by Tetra Tech Construction Services, Inc., at its Commerce City and Fort Collins, Colorado operations.³ At the hearing, the Parties stipulated that elections should be directed in separate units for the Commerce City and Fort Collins locations and further stipulated to the composition of each of these separate units.⁴ Near the close of the hearing, the Joint Petitioner indicated that it was withdrawing its interest in representing the Fort Collins unit employees and that it

¹ The petition named the Employer as: DEA Construction Co./Tetra Tech Construction Services, Inc. The record established that Tetra Tech purchased DEA Construction five years ago and that DEA Construction was dissolved as a legal entity in the fall of 2003, at which time the Employer ceased operating under that name. The Employer currently operates solely under the legal name of Tetra Tech Construction Services, Inc. Accordingly, I deem the petition amended to reflect the correct legal name of the Employer.

² All subsequent dates are in 2004, unless noted otherwise.

³ Fort Collins is located approximately 60 miles north of Denver, while Commerce City is located within the Denver Metropolitan Area. The Employer also maintains a corporate office in Thornton, Colorado, another Denver suburb, however, it does not have any employees in the petitioned-for classifications working out of that location.

⁴ The separate units were described as including: "All laborers, truckdrivers, yard personnel, operators, mechanics, leadmen/foremen, and excluding all office clericals, professional employees, superintendents, managerial employees, guards and supervisors as defined in the Act."

wanted to proceed to an election only as to the Commerce City unit. Thereafter, on April 16, the Joint Petitioner renewed its interest in the Fort Collins unit by filing a new joint petition in Case No. 27-RC-8318. That matter was set for hearing on April 27.

On April 26, the Employer filed a document entitled “Motion to Quash Notice of Representation Hearing and For Other Relief,” seeking dismissal of the joint petition in Case No. 27-RC-8318 on the basis that the petition was inconsistent with the Joint Petitioner’s representation at the hearing in Case 27-RC-8316 that it was withdrawing its interest in an election covering the Fort Collins employees (and the hearing had now closed in Case 27-RC-8316). This Motion further argued that the joint petition filed in Case 27-RC-8318 should be dismissed as improperly filed and that the Joint Petitioner should be precluded from seeking an election involving the Employer’s Fort Collins employees (presumably for a period of six months).

After the Employer filed its Motion to Quash Notice of Representation Hearing and For Other Relief, it entered into a document entitled “Joint Stipulation” with the Joint Petitioner, redesignating the Motion to Quash as a “Motion to Dismiss” and referring it to me for consideration in accordance with said Joint Stipulation. In part, the Joint Stipulation provided that “the issues set forth in this Stipulation are the issues raised by the Petition in this case (27-RC-8318), and further Stipulate that the Regional Director may decide these issues based upon the transcript of the hearing in Case 27-RC-8316. The parties further hereby waive any right to file briefs in regard to this Petition, or the issues stated herein.” Thus, the issues to be addressed by this decision include those raised in the hearing held in Case 27-RC-8316 and those referenced in the Joint Stipulation executed by the parties in Case 27-RC-8318. Accordingly, I find that consolidation of Cases 27-RC-8316 and 8318 is warranted, and I hereby consolidate

these matters for consideration of the issues addressed below.⁵

Turning first to the Motion to Dismiss the Joint Petition, I deny said Motion for the following reasons: In essence, the Employer argues in its Motion that I should treat the Joint Petitioner's statement at the hearing in Case 27-RC-8316 that it was withdrawing all interest in having an election for the Fort Collins employees and seeking to proceed to an election only for the Commerce City unit as a motion to withdraw the joint petition in that case. The Employer's Motion further argues that once the hearing closed after the Joint Petitioner's withdrawal of interest in an election for the Fort Collins unit, prejudice attached to the filing of a new petition relative to the Fort Collins unit. I deny the Employer's Motion, because I conclude that the Joint Petitioner's statements concerning withdrawal of interest in an election for the Fort Collins employees during the hearing in Case 27-RC-8316 did not constitute withdrawal of the petition in that matter, rather, it simply served as a motion to amend the petition.⁶

Section 11204 of the Board's Casehandling Manual specifically provides that a petitioner during the course of the hearing may seek to amend its petition. This provision of the Casehandling Manual, citing **Atlantic Richfield Co.**, 142 NLRB (1974), further provides that such an amendment should be permitted, as a petitioner should be entitled to seek an election in the unit of its choosing. The record transcript from the hearing conducted in Case 27-RC-8316 is clear that the hearing had not closed at the time counsel for the Joint Petitioner sought to withdraw interest in representing the Fort

⁵ I hereby administratively receive into the record the formal papers relating to the joint petition in Case No. 27-RC-8138, which have been identified as Board Exhibit 2(a) to (f). Board Exhibit 2(a) is the Joint Petition; 2(b) is the Notice of Representation Hearing; 2(c) is the Certificate of Service of the Notice of Representation Hearing; 2(d) is the Employer's Motion to Quash Notice of Representation Hearing and For Other Relief; 2(e) is the Joint Stipulation; and 2(f) is an Index and Description of the formal papers.

⁶ The contention in the Employer's Motion that "Joint Petitioners withdrew the Petition for the Fort Collins unit only after recess of the April 8, hearing and, presumably, in consultation with the Regional Director or his representative", is simply wrong, and the reference to Section 102.60 of the Board's Rules and Regulations, which concerns a petition being withdrawn "only with the consent of the Regional Director to whom such petition was filed", is irrelevant.

Collins unit. Thus, even if the Joint Petitioner's disclaimer of interest in the Fort Collins unit could be viewed as a withdrawal of the petition, no prejudice would attach to the filing of a subsequent petition. See Section 11111 of the Board's Casehandling Manual. Importantly, however, the record is clear that the petition in fact was not withdrawn and that the parties were in agreement that an election would be directed concerning the Commerce City employees as a result of the petition filed and still being processed in Case 27-RC-8316.⁷

Having denied the Employer's Motion to Dismiss the Joint Petition, I now turn to the remaining issues. Since the parties stipulated to the scope and composition of the appropriate units, there are three issues left for my determination – (1) whether the Board may assert jurisdiction over the Employer; (2) whether the Joint Petitioner is a labor organization with the meaning of the Act and whether its joint petition warrants further processing; and (3) whether the Employer is a construction industry employer for purposes of application of the **Daniel/Steiny**⁸ construction industry voter eligibility formula.

As to the first issue, the Employer refused to stipulate that it is an Employer engaged in interstate commerce and therefore subject to the Board's jurisdiction. I find, however, that the Employer is an employer engaged in interstate commerce sufficient for the Board to establish jurisdiction over the instant proceedings.

With respect to the second issue, the Employer takes the position that the Joint Petitioner is not a labor organization under the Act and that the joint petition was a

⁷ The Employer's Motion references Section 102.65.(e)(1) of the Board's Rules and Regulations concerning Joint Petitioner's purported wish to place additional, or different, information into the Record (in Case 27-RC-8316) following the close of the April 8 hearing and the need in that circumstance to move for a "reopening of the Record." I find that it is unnecessary to further address this assertion in light of the parties' Joint Stipulation.

⁸ See **Daniel Construction Company**, 133 NLRB 264 (1961), as modified in 167 NLEB 1078 (1967); **Steiny & Co.**, 308 NLRB 1323 (1992).

“sham,” as the Joint Petitioners have “no intention of jointly representing the unit.” For the reasons set forth below, I find that the Joint Petitioner is a labor organization within the meaning of the Act and that the petitions filed in these matters were properly filed.

In regard to the third issue, contrary to the Joint Petitioner, the Employer contends that it is not a construction industry employer, and, thus, it would be inappropriate to direct elections in these matters requiring use of the **Daniels/Steiny** voter eligibility formula. I conclude for the reasons enunciated below that the Employer is not a construction industry employer for purposes of application of the **Daniels/Steiny**

construction industry voter eligibility formula urged by the Joint Petitioner, and I shall direct an election requiring a standard eligibility formula.

On April 8, Daniel L. Robles, a hearing officer of the National Labor Relations Board, conducted a hearing on the above three issues. Following the hearing, the parties timely filed briefs addressing these issues.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I make the following findings:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer, Tetra Tech Construction Services, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board. In support of this finding, I note the following:

Section 2(6) of the Act defines “commerce” as: “means, trade, traffic, commerce, transportation, or communication among the several States, . . . or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.” The record establishes that the Employer’s parent company⁹ has its headquarters in California, and the Employer has facilities in Colorado, Idaho, and California.

While the Employer offered the conclusory testimony of its President, Christopher A. Sutton on direct examination, that “to his knowledge” the Employer did not derive \$50,000 of gross revenue from the performance of services to customers outside Colorado or to other customers who made sales directly to customers outside the State and that the Employer did not purchase \$50,000 of goods or materials directly from outside of Colorado or from suppliers who directly received materials from outside the State of Colorado, on cross examination the Joint Petitioner elicited testimony from Mr. Sutton establishing that the Employer, in fact, meets the Board’s jurisdictional standards.

Specifically, Mr. Sutton testified that the Employer’s parent company has its headquarters in California and that this parent company employs approximately 9,000 employees, including those at issue herein and those at two other subsidiaries that perform similar work in Illinois and Washington. Tetra Tech Construction Services, Inc., the employer entity that is the subject of the instant petition, does an annual gross volume of business of approximately \$18 million in the states of Colorado, California

⁹ The parent company was never specifically identified in the record.

and Idaho and has approximately 120 employees working at its Thornton, Commerce City and Fort Collins facilities.

The Employer herein leases Volvo backhoes, which are manufactured by an entity based in Sweden, from a supplier in Chicago, Illinois, at an annual cost in excess of \$200,000 per year for use in its Colorado operations. The Employer also purchases about \$30,000 of fuel per month for its Colorado operations. Mr. Sutton also testified that the Employer seeks to purchase about six Ford half-ton pickup trucks this year, at a cost per unit in excess of \$17,000. The Employer is awaiting approval of its budgets from the California parent headquarters before finalizing the purchase of these pickups. Mr. Sutton testified that Tetra Tech Construction Services, Inc. will be the actual purchaser of the pickups, although it uses the “collective purchasing power” of its parent company which has a contract to purchase trucks wholesale directly from Ford Motor Corporation.

Employees of the Employer based in Commerce City lay coaxial cable for its largest customer, Comcast, an entity that provides cable television services throughout Colorado.¹⁰ Comcast supplies most of this cable to the Employer for installation. According to Mr. Sutton, this cable comes on 1,600-foot spools, and can either be empty or contain conduit. Empty cable costs about 50 cents per foot and the cost for that containing conduit was unknown by Mr. Sutton.

At the Fort Collins operations, the Employer’s largest customer is Fort Collins Light and Power. This public utility has contracted with the Employer to convert overhead electrical lines to underground lines. While Fort Collins Light and Power provides most of the piping used for this conversion, Mr. Sutton testified that the

¹⁰ I also take administrative notice that Comcast provides cable television services in numerous other states and that it meets all direct inflow and outflow jurisdictional standards established by the Board. See, e.g., Cases 27-RD-1139 and 27-CA-18369.

Continued

Employer purchases approximately \$40,000 of pipe annually from Communication Products & Services, a supplier located in Englewood, Colorado, for smaller jobs with entities other than Fort Collins Power and Light or Comcast.

In **Siemons Mailing Service**, 122 NLRB 81 (1958), the Board set forth the jurisdictional policies still in application today. In so doing, it stated:

Under the new standards, the Board will continue to apply the concept that it is the impact on commerce of the totality of an employer's operations that should determine whether or not the Board will assert jurisdiction over a particular employer... Accordingly, the Board will continue its past practice of totaling the commerce of all of an employer's plants or locations to determine whether the appropriate jurisdictional standard is met. . . . [T]he Board has concluded that it will best effectuate the policies of the Act if jurisdiction is asserted over all nonretail enterprises which have an outflow or inflow across State lines of at least \$50,000, whether such outflow or inflow be regarded as direct or indirect.

Based on the foregoing, I find that the Employer is a corporation with a corporate office located in Thornton, Colorado, operations facilities in Commerce City and Fort Collins, Colorado, and additional facilities in California and Idaho. The Employer is primarily engaged in the installation of coaxial cable for the cable television industry at its Commerce City location and the conversion of overhead power lines to underground lines at its Fort Collins location. During the past twelve months, the Employer purchased and received at its Colorado facilities goods or materials valued in excess of \$50,000 directly and indirectly from points and places located outside the State of Colorado. Therefore, the Employer satisfies the Board's statutory jurisdictional requirement, as well as the Board's discretionary standard for asserting jurisdiction over non-retail enterprises. **Siemons Mailing Service**, 122 NLRB 81 (1959).

3. I find further that Joint Petitioner is a labor organization within the meaning of Section 2(5) of the Act, notwithstanding the refusal of the Employer to so stipulate,

because, allegedly, the joint petition allegedly is a “sham” and the Joint Petitioner has “no intention of jointly representing the unit.” Section 2(5) of the Act defines the term “labor organization” as follows: “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purposes, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” The record testimony of the officials for Operating Engineers Local 9 and Laborers Local 720 establishes that both local unions comprising the Joint Petitioner have employee members, operate under constitutions and bylaws, and engage in collective bargaining on behalf of employees to improve employee wages and benefits.

As to the issue of whether the two labor organizations involved in this matter jointly constitute a labor organization within the meaning of Section 2(5) of the Act, it is well settled that the Board will certify joint petitioners to represent units of employees. **Swift & Company**, 115 NLRB 752 (1956), is instructive as to this issue. In that matter, the Board denied a motion to dismiss in the absence of evidence to support the employer’s contention that the joint petitioner would not bargain on a joint basis for the unit found to be appropriate. Specifically, the Board stated: “The names of the Petitioners will appear jointly on the ballots, and, if they are successful in the election hereafter directed, they will be certified jointly as the bargaining representative of the employees in the appropriate unit. The Employer may then insist that the Petitioner bargain jointly for such employees as a single unit.”

Automatic Heating & Service Co., Inc., 194 NLRB 1065 (1972), is cited by the Employer in support of its contention that the petition herein should be dismissed, allegedly because the joint petition is a “sham”. In that case, the Board stated that:

The filing of a joint petition is a prima facie showing of the requisite intent of the Joint Petitioners to bargain jointly for the requested unit of

employees. However, the record testimony . . . rebuts such showing. That testimony indicates that the Sheet Metal Workers and the Steamfitters intend to represent the employees in the unit who fall within their respective jurisdictions not merely for purposes of servicing them under a contract negotiated with the Employer, but it establishes that each of them intends to bargain solely for employees within its jurisdiction as if they constituted separate units. Such an intention is inconsistent with the concept of joint representation.

The testimony in **Automatic Heating & Service Co.** to which the Board referred was that of the Sheet Metal Workers representative that, because his organization negotiates its contracts with the Sheet Metal Contractors Association of Memphis and because the pipefitters and servicemen would be covered by a contract negotiated with a different employer association, he could not represent them. Similarly, the Steamfitters representative in that case stated that he only represents pipefitters and servicemen and was not willing to represent sheetmetal workers. The Steamfitters representative further testified that his idea of joint representation was that each union would represent only their own classifications of employees.

Contrary to the evidence in **Automatic Heating and Service Co.**, the record developed in the case now under consideration does not establish a refusal to jointly represent the employees in the unit. In fact, the Joint Petitioner has indicated it will do so. Specifically, in answer to a question from counsel for the Employer, the Operating Engineers organizer testified that, “if people want representation, I will be there to represent them.” Moreover, the record is replete with assurances from counsel for the Joint Petitioner that the unions comprising the Joint Petitioner intend to bargain jointly on behalf of the employees in the stipulated units. Thus, I conclude that there is no basis to establish that the Joint Petition is a “sham”, that Operating Engineers Local 9 and Laborers Local 720 do not intend to bargain jointly on behalf of the unit employees,

or that the Joint Petitioner will not jointly represent the employees should it become the employees' representative.¹¹

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following units of employees:

Unit 1, Commerce City, Colorado:

INCLUDED: All laborers, truckdrivers, yard personnel, operators, mechanics, leadmen/foremen employed at the Employer's Commerce City, Colorado facility.

EXCLUDED: All office clericals, professional employees, superintendents, managerial employees, guards and supervisors as defined in the Act.

Unit 2, Fort Collins, Colorado:

INCLUDED: All laborers, truckdrivers, yard personnel, operators, mechanics, leadmen/foremen employed at the Employer's Fort Collins, Colorado facility.

EXCLUDED: All office clericals, professional employees, superintendents, managerial employees, guards and supervisors as defined in the Act.

The sole remaining issue herein is whether the Employer is an employer engaged in the construction industry warranting direction of elections requiring utilization of the **Daniels/Steiny** construction industry voter eligibility formula.

STATEMENT OF THE CASE

¹¹ I also specifically affirm the Hearing Officer's rulings relating to Employer's repeated attempts to inquire as to the mechanics of exactly how Laborers Local 720 and Operating Engineers Local 9 intended to structure their joint representation of the unit employees. The exact mechanics of how these labor organizations intend to structure their joint representation of the bargaining unit (in the event they become the certified representative) is irrelevant to the issue of whether the Joint Petitioner is a labor organization within the meaning of the Act. The dispositive fact is that the Joint Petitioner has indicated that it will jointly represent the bargaining unit employees if it becomes the certified representative.

A. Background

The Denver area manager is Lance Manthe. He is responsible for overseeing the Commerce City operations. Reporting to Manthe are nine superintendents, whom the parties agreed should be excluded from the unit on the basis that they are statutory supervisors. They are: Louis Crevier, Ron Phelps, Michael Alvino, Ken Hadrick, Gale Kohl, Joe Maestas, Carlos Flores, Chris Knott and Jon Kosko. The Northern Colorado manager, who oversees the Fort Collins operations, is J.T. Keever. Reporting to Keever are six superintendents, whom the parties agreed should be excluded from the unit on the basis of their status as statutory supervisors. They are: Mike McFaden, Pete Vanwhyte, James Dixon, Domingo Torres, Chris Thomas, and Curtis Burke. Both Keever and Manthe report to the business development manager, Robert Gudka, who maintains an office in Thornton, but who spends some time each week at both the Commerce City and Fort Collins facilities.

B. Nature of the Work Performed by the Employer

The largest customers for the Commerce City operation are Comcast and IGC, a provider of high-speed data telephone services to companies other than Qwest (the regional telephone company). The Employer has had an on-going maintenance contract with Comcast for the installation of coaxial cable television transmission lines for a number of years. Work under this contract constitutes about 90 percent of the work performed by the employees in the Commerce City unit. Another five percent of the work done by the Commerce City unit employees is installation of telecommunication lines for IGC. The remaining five percent of the work done by the Commerce City unit employees is for small, mostly one-time customers, although there are a few smaller communications companies that have on-going contracts with the Employer for small projects. An example of this type of work includes a customer,

which has changed business locations, utilizing the Employer to run telephone conduit from an existing workspace to new space. Included in this last five percent of the Employer's overall Commerce City work is a new type of sewer and water line installation work awarded to the Employer by traditional bid for an entity known as Adams County Water Company. The Employer performed the work on one of these contracts in February 2004 and is currently performing work on a second contract.

With regard to the Fort Collins operations, prior to February 2004, the Employer had an ongoing contract with Comcast to install coaxial cable television transmission lines for the Northern Colorado area. The Employer cancelled that contract in February, because Comcast had reduced the amount of work under the contract by 50 percent and significantly reduced the amount it was willing to pay the Employer for its services. As a result of this reduction in business, the Employer decided the Comcast contract was no longer cost effective and permanently laid off 15 employees (almost 50% of its workforce in Fort Collins) who had been performing the Comcast work. The record reflects that these employees, while eligible for rehire if they obtain the skills necessary for the remaining Fort Collins work, were permanently laid off due to the dissimilarity of the Comcast work as compared to the remaining work done at the Fort Collins operation. In this regard, 95 percent of the work currently done by the Fort Collins operation is conversion of overhead power lines to underground power lines pursuant to a city beautification effort. The remaining five percent of the work is installing telecommunications conduit for Larimer County government operations, resulting from the transfer of governmental offices from one building to another; installing empty sleeves into trenches to enable Atmos Energy Company to run natural gas lines; installing telecommunications conduit for IGC; and replacing the telecommunications conduit for the Platte River Power Authority.

The Employer does not bid for the work it performs for the Commerce City

Comcast, IGC or other small contractors or one-time customers in the traditional sense. Rather, the Employer negotiates longterm contracts to perform this work. If both parties desire to continue the contractual relationship, they renew the financial terms of the contracts on an annual or biannual basis. The record indicates that the Employer also did not bid its work for Fort Collins Light and Power, Atmos Energy or Platte River Power Authority in the traditional sense, as it again negotiated longterm contracts with these entities.

The average length of employment for the current Commerce City employees is two to three years and for Fort Collins, the average is about three to four years. All training is done internally by the Employer, and employees regularly progress from the entry level laborer positions, such as laying cable in the trenches, to the highest skill level positions of splicing and activating the coaxial cable at the pedestal junction boxes in accordance with Comcast's requirements. Employees involved in data communication line installation also progress from ground level handwork to crew foreman, who must know all of the proper handling and hook up procedures for the fiber optic cable being installed.

C. Commerce City Operations

The Employer has about 60 unit employees working from the Commerce City facility. These employees work on four different types of crews. These crews are vac-truck crew, aerial crew, joint-trench crew, and support/backyard crew. There are multiple numbers of each type of crew, although the record does not establish the actual numbers.

The vac-truck crews operate equipment designed for locating buried utility lines. The Employer uses these three-man crews to locate utilities in areas where the Employer is doing maintenance work for Comcast prior to digging up damaged or faulty cable or tying in new cable lines to existing lines where there are existing utilities. The Employer also gets requests to locate buried utilities from engineering companies which

are doing pre-engineering for projects such as road widening or installation of new sewer, water or other utilities. When the Employer needs to locate utilities, employees from the Colorado Utility Notification Center go out to the site and identify where the buried lines should be. The Employer's vac-truck crew then goes to the site with a vacuum excavation truck and drills a six-inch diameter hole to expose the buried lines. This can include locating water, sewer, gas, power, phone, or cable TV lines. The hole is actually drilled using either pressurized water or air, while simultaneously vacuuming the dirt out of the way. The employees on the vac-truck crew progress from the entry-level laborer positions to the machine operator position and foreman/locator position. The operator actually runs the directional subterranean drilling equipment, and the locator is the employee who positions the end of the drill so that it drills in the right place. The locator also "reads" the signals from the equipment in order to stop when the utility lines are located or when the equipment is too close to natural gas lines or other dangerous situations. The locator must be aware of various regulations as to how close the drill can come to various buried utility lines. In addition to exposing the buried utilities so they can be seen with the naked eye, the crew also generates a written report of the location and depth of the utilities they find.

Two-man aerial crews are responsible for cable repairs on above ground cable lines. They use a bucket truck similar to those used by power companies with one employee in the bucket and one employee on the ground. This work involves locating damaged or faulty cable and slicing new cable to make the repairs.

The two-man joint-trench crews perform work for Comcast laying coaxial cable in new residential subdivisions. These lines are laid in so-called "joint trenches" dug in the residential area for multiple utility installations. These trenches are dug and later backfilled by other contractors, not the Employer. The cable lines generally are laid in the same pattern as the power lines, which are laid out to be able to reach all the homes in the new subdivision. The unit employees drive a truck with a reel trailer to the job site and use the mechanism on the trailer to roll the coaxial cable off the huge spools into the open trench, leaving the ends sticking up out of the trench when they reach the end of the spool. After the cable is laid, the Employer's splicer/activator will tie the two ends

of the cable together in an above ground pedestal following Comcast blueprints to ensure viability of the cable television signal from pedestal to pedestal. The only trenching and backfilling done by the Employer is from the end of the new line to the Comcast existing line tie in point. The Employer is not responsible for tying the new homes into the main line.

The support/back yard crews are used to assist any of the other crews who may be running behind in their scheduled work. These crews consist of a foreman who must be able to read Comcast installation prints and two laborers. The support/back yard crews primarily perform the maintenance work on the Comcast contract, including hand digging in residential back yards, if there is a problem with a cable signal, and trenching mainline cables for repairs or for the tie in of new construction to existing cable systems.

As noted above, the Employer's Commerce City operation has recently been awarded two contracts with Adams County Water Company to install water or sewer lines under a traditional bidding system.¹² This is a new line of work that the Employer is hoping to break into and somewhat dissimilar from virtually all the work it has performed previously, because it involves bidding on contracts for specific projects. This newly-acquired work also requires more actual trenching and backfilling than required for coaxial cable and fiber optic cable installations, as well as employees working in the trench rather than using mechanical equipment to lay the cable or conduit. One of the Adams County Water Company projects is completed and the other is still underway. The Employer also has an outstanding bid to do some storm sewer installation work for Adams County Water Company, but that bid has not been awarded. This work for Adams County Water Company has some similarity to the Employer's primary work in that some of the pipe is installed by use of an auger boring machine which sets the pipe in place by a machine that bores through the dirt while simultaneously laying the pipe. This is used in applications where the pipe needs to be laid under a street or railroad tracks without tearing up the surface.

¹² Again, this work constitutes only a fraction of the five per cent of the work done by the Employer's Commerce City operation that was not performed pursuant to established contracts with Comcast and ICG.

D. Fort Collins Operations

The Employer has about 20 unit employees working from its Fort Collins facility. These employees work on three different types of two-man crews replacing aerial powerlines from homes to the mainline connection. After the Employer's crews have laid the underground cable on the private property, the power company ties the home into the underground mainline. The crews used by the Employer are the vac-truck crew, drill crew, and backyard crew. The vac-truck crews perform utility location work similar to that of the Commerce City vac-truck crews. The drill crews consist of a locator and an operator who use subterranean auger/boring equipment similar to that utilized for the sewer and water line installations done by the Commerce City employees. This equipment drills underground and simultaneously lays the underground cable. The backyard crews in Fort Collins follow the drill crews and do any hand trenching necessary to tie the cable put in by the drill crew to the mainline.

ANALYSIS AND CONCLUSIONS

In **Steiny and Company, Inc.**, 308 NLRB 1323 (1992), the Board decided to re-adopt the **Daniel** voter eligibility formula and require its application to all construction industry elections, absent an express stipulation by the parties to not apply the **Daniel** formula.¹³ This holding was affirmed by the Board in **Signet Testing Laboratories, Inc.**, 330 NLRB 1, (1999). Thus, if the Employer herein is a construction industry employer, then application of the **Daniel** eligibility formula is required, as the Joint Petitioner is unwilling to stipulate to the traditional eligibility formula used in cases outside the construction industry. While the Board in **Steiny** and **Signet Testing Laboratories** addressed the application of the **Daniel** formula to all cases involving

¹³ The **Daniel** formula provides that, in addition to those eligible to vote under the standard criteria, unit employees are eligible to vote if they have been employed for 30 working days or more within the 12-months preceding the payroll eligibility date for the election; or if they have had some employment within those 12-months and have been employed for 45 working days or more within the 24-month period immediately preceding the payroll period for eligibility date, providing that they have not voluntarily quit or been terminated for cause prior to the last job for which they were employed.

Continued

employers primarily engaged in the construction industry, there was no dispute in those cases that the employer was in fact engaged in the construction industry. There appear to be no reported representation cases involving application of the **Daniel** formula where the status of the employer vis-à-vis the construction industry was at issue. Rather, in most cases involving **Daniel/Steiny** issues, the parties have stipulated to the fact that the employer is a construction industry employer and are litigating the applicability of the construction eligibility formula to the particulars of that employer's employment practices. Issues involving whether a given employer is determined to be a "construction industry employer" are most often litigated in cases arising under Section 8(e) or 8(f) of the Act.

In cases determining whether an Employer is engaged in the building and construction industry and therefore privileged to enter into a Section 8(f) agreement, the party asserting the application or protection of Section 8(f) bears the burden of proof. See, **Bell Energy Management Corp.**, 291 NLRB 168 (1988), citing **Painters Local 1247 (Indio Paint)**, 156 NLRB 951 fn. 1 (1966). Similarly, in Section 8(e) cases, the party asserting Section 8(e) construction industry proviso protection bears the burden of proof. **Carpenters Chicago Council (Polk Brothers)**, 275 NLRB 294, 296 (1985). These burdens of proof rest with the party making the assertion because such findings result in special treatment afforded under the Act. Accordingly, I conclude that the Joint Petitioner bears the burden of establishing that the Employer is a construction industry employer herein, since a finding that the Employer is primarily engaged in the construction industry results in the Joint Petitioner being able to require use of the **Daniel/Steiny** eligibility rule in the elections being directed over the Employer's objection. Where, as here, the evidence is insufficient to establish that the employer is

engaged in the construction industry, I conclude that it is appropriate to limit voter eligibility to standard Board eligibility principles.

I find that the underpinnings for the Board's rationale in **Daniel/Steiny** are not present here and are further basis to conclude that the Employer is not engaged in the construction industry in such a manner as would warrant the automatic application of the **Daniel** formula as required by **Steiny**.

In this regard, in **Steiny**, supra, the Board, while not explicitly defining what was meant by “construction industry,” stated that:

[T]he construction industry is different from many other industries in the way it hires and lays off employees. . . . We also have recognized the fluctuating nature and unpredictable duration of construction projects. . . . We note that numerical formulas have also proved their worth in some sectors outside the construction industry. The common denominator in these other special industries is a pattern of employment that does not reflect a prevalence of employees working regular workweeks for extended uninterrupted periods of time with the same employer.

The Board in **Steiny** also noted that, if a special formula was not used in the construction industry, the intermittent nature of the work would require the individual determination of the eligibility status of large numbers of laid off employees.

Sections 8(e) and 8(f) also do not expressly define what is meant by the “construction industry,” so the cases arising under these two sections generally involve complex, fact specific analysis of that issue. In many of those cases, the Board explicitly states that the Act itself does not define what is meant by the construction industry. Research for the present matter revealed no cases arising under Sections 8(e), 8(f), or **Daniel/Steiny** dealing with an employer performing work similar to that of the Employer herein; specifically, providing utility services in the form of laying coaxial television cable for a cable television company such as Comcast and converting overhead powerlines to underground for Fort Collins Power and Light. Some of the Section 8(e) and 8(f) cases do, however, attempt to define the construction industry

through exploration of Board authority and the legislative history of enactment of the special sections of the Act applying to the construction industry and provide guidance for my analysis herein.

For instance, the Board has defined building and construction work generally as “the provision of labor whereby materials and constituent parts may be combined on the building site to form, make or build a structure. **Painters Local 1247 (Indio Paint)**, supra, at 959. The Board also has stated that “construction covers installation of those types of immobile equipment which, when installed, become an integral part of the structure and are necessary to any general use of structure. This includes such service facilities as plumbing, heating, air-conditioning, and lighting equipment . . . In general, construction does not include the procurement of special purpose equipment designed to prepare the structure for special use. See **C.I.M. Mechanical Co.**, 275 NLRB 685, 691 (1985).¹⁴ Thus, it would appear that the installation of cable television lines, high speed data transmission lines, and conversion of already installed powerlines from overhead to underground for beautification purposes would fall under the “special use” category addressed in **C.I.M. Mechanical**, as they are not “necessary to any general use.”

In **Forest City/Dillon-Tecon Pacific**, 209 NLRB 867 (1974), the Board affirmed the decision of an administrative law judge in which that judge explored the legislative history and extant body of Board law in his analysis of whether the employer therein was engaged in the building and construction industry under Section 8(f). The issue in that case was whether an employer engaged in the manufacture, sale and delivery of precast concrete building products was an employer primarily engaged in the building

¹⁴ In a recent case, **F.H.E. Services, Inc.**, 338 NLEB No. 168 (2003), the Board affirmatively cited the ALJ's use of the definition of construction contained in **C.I.M. Mechanical** and a Section 8(e) case, **Carpenters (Rowley-Schlimgen)**, 318 NLRB 714 (1995). In **Rowley-Schlimgen**, the Board relied on the definitional language from **Indio Paint** cited above to find that employer

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and construction industry rendering its entry into an 8(f) agreement lawful. In finding that employer to not be primarily engaged in the building and construction industry, the judge cited the following from the legislative history surrounding the enactment of Section 8(f):

Legislation authorizing prehire agreements in the construction industry is necessary because the industry cannot conform to the present law. The NLRA was written for mines, mills, factories, and similar establishments with a stable working force. The employees on the payroll may choose a bargaining representative which will thereafter negotiate with the employer an agreement fixing wages, hours, and other terms and conditions of employment. The Act incorporates the principle of majority rule in choosing a representative. Therefore, no representative can be chosen and no contract can be negotiated until the employer has hired a sufficient number of employees. . . . Collective bargaining agreements must be negotiated in the construction industry before employees are hired.

The administrative law judge in **Forest City/Dillon-Tecon Pacific** went on to describe three factors peculiar to construction industry employers. First, contractors need to know what wage and benefit rates are before submitting their bids for projects. Second, many projects are of such short duration that work would be completed long before a collective bargaining agreement could be negotiated. Third, it is “manifestly inefficient” to negotiate a separate contract for every project.

Similarly, in **International Union of Operating Engineers, Local 2 (Stief Co. West)**, 314 NLB 874 (1994), the Board determined that an employer engaged in the erection of concrete highway bridge barrier walls, whose employees specifically hoisted, lowered, placed, and removed steel forms, fell within the construction industry proviso of Section 8(e). That proviso states: “Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at

to be a floor-covering contractor in the construction industry.

the site of the construction, alteration, painting, or repair of a building, structure or other work.” In Footnote 4 of that decision, the Board stated: “the legislative history of Section 8(e) reveals that a primary motivation of the enactment of the proviso was the desire to ‘prevent potential labor strife between union and nonunion personnel working at the same jobsite.’ [Citation omitted.] Thus, these concerns are not implicated by the temporary presence on the jobsite of delivery personnel.”

In summary, the Section 8(f), Section 8(e) and **Daniel/Steiny** cases reveal that the rationale of Congress and the Board for dealing specially with construction industry employers relates to factors including the following: employers need to know the costs of labor prior to bidding work; employers need to be able to obtain a ready source of labor in an industry where the workers do not work for the same employer for long periods of time; and employers need to complete projects within a specified time and with an absence of labor strife on projects, because the timing of each phase of construction is critical to the next phase. Employees need to have the ability to seek representation in an industry where the short-term nature of the projects would prevent such representation if the normal Board election processes were followed; employees need to make themselves available to a variety of other employers as the work on projects ebbs and flows; and employees need the ability to express their representational interests through a special voter eligibility formula when they work intermittently for an employer on short duration construction projects.

Based on the record herein and the above-noted rational for finding employers to be “construction industry” employers, I conclude that Tetra Tech Construction Services, Inc., is not a “construction industry” employer for application of the **Daniel/Steiny** election eligibility voting formula. In part, this finding rests in the fact that the Employer does not bid on work in the traditional sense of construction industry employers, but rather, almost exclusively performs work on longterm stable contracts. Also, the

Employer does not regularly hire and layoff employees as work ebbs and flows, but has a stable workforce with entry level laborer positions and the ability for employees to progress through on-the-job training into more skilled positions. Finally, the nature of the work performed for Comcast and Fort Collins Power and Light, the two largest customers of the Employer's services, is really more akin to work performed by utility companies, not that of contractors on traditional constructions sites. Accordingly, I shall direct the elections in this consolidated proceeding using the standard eligibility formula, rather than the **Daniel/Steiny** construction industry formula urged by the Joint Petitioner.

There are approximately 60 employees in the Commerce City unit and about 20 employees in the Fort Collins unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the units found appropriate at the time and place set for in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.¹⁵ Eligible to vote are those in the Units as described above who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Elections, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which

¹⁵ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that it's failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

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commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible in each of the elections directed shall vote whether or not they desire to be represented for collective bargaining purposes by:

OPERATING ENGINEERS LOCAL 9 AND
LABORERS LOCAL 720 (AS JOINT REPRESENTATIVE)

.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the elections should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that an election eligibility list, containing the **FULL** names and addresses of all the eligible voters in each election, must be filed by the Employer with the Regional Director for Region 27 within 7 days of the date of the Decision and Direction of Elections. The list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the

employees in the unit found appropriate has been established.

In order to be timely filed, such lists must be received in the Regional Office, 600 17th Street, 7th Floor, North tower, Denver, Co 80202-5433, on or before **May 11, 2004**. No extension of time to file these lists may be granted, nor shall the filing of a request for review operate to stay the filing of such lists except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside these elections whenever proper objections are filed. The lists may be submitted by facsimile transmission. Since the lists are to be made available to all parties to the election, please furnish a total of 2 copies for each election, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Elections may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by **May 18, 2004**.¹⁶

Dated at Denver, Colorado this 4th day of May 2004.

/s/ B. Allan Benson

B. Allan Benson, Regional Director
National Labor Relations Board
Region 27
Dominion Plaza, 7th Floor, North Tower
600 Seventeenth Street

¹⁶ In accordance with Section 102.67 of the Board's Rules and Regulations, as amended all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

